IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A.D.E. FOOD SERVICES CORP. and ZENOBIA WARIDI, Plaintiffs, v. CITY OF PHILADELPHIA, MARY ROSE LONEY, ARA SERVICES, INC., ARAMARK LEISURE SERVICES, INC., WORLDWIDE CONCESSIONS, INC., and MARKETPLACE/REDWOOD CORP., Defendants.	:	CIVIL ACTION NO. 95-7485

MEMORANDUM

ROBERT F. KELLY, J. OCTOBER 9, 1997

Before this Court are Defendants' Motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This lawsuit stems from the operation and cessation of Plaintiffs' business at Philadelphia International Airport ("Airport"), which Plaintiffs claim was motivated by discrimination in violation of 42 U.S.C. § 1983 ("Section 1983"). Plaintiffs also allege breach of contract, tortious interference with contractual relations, and tortious interference with prospective contracts. For the reasons that follow, Defendants' Motions will be granted in part and denied in part.

Background

In December of 1971, Defendant City of Philadelphia ("City") and ARA Services, Inc. ("ARA") entered into a lease ("Basic Lease") granting ARA the right to administer the food and beverage concessions at the Airport. Between the commencement of

the Basic Lease in January of 1972 and June 4, 1986, ARA and the City executed six amendments to the Basic Lease, none of which are material to the present dispute. On June 4, 1986, ARA and the City executed Amendment No. 7 to the Basic Lease, which included three key provisions to achieve greater minority-owned and female-owned participation in the food and beverage concessions at the Airport.

The first provision of Amendment No. 7 required that ARA commit to purchasing a minimum of 15% of its inventory requirements from any combination of qualified minority-owned business enterprises ("MBEs") and women-owned business enterprises ("WBEs"). There is no contention that ARA failed to comply with this provision.

Second, Amendment No. 7 required that ARA conduct its Airport concession operations through a joint venture with a qualified MBE or WBE, with such firm owning at least 15% interest in the joint venture. On November 26, 1987, ARA executed a joint venture agreement with a qualified MBE known as World Series Concessions, Inc., later renamed World Wide Concessions, Inc. ("WWC"). Subsequently, on February 20, 1987, ARA, with the City's consent, assigned its interest in the Basic Lease to the joint venture ("ARA/WWC"). There is no contention that ARA/WWC breached the joint venture provision of Amendment No. 7.

The third provision of Amendment No. 7 required that ARA/WWC contract with a qualified MBE or WBE to operate the

Fountain Court restaurant[1] or some other food and beverage operation at the Airport mutually agreed upon by the City and ARA/WWC. Pursuant to this provision, ARA/WWC entered into a Management Agreement with A to Z, Inc. ("A to Z"), predecessor to Plaintiff A.D.E. Food Services Corporation ("ADE"), a certified MBE/WBE owned by Plaintiff Zenobia Waridi, an African-American woman, whereby Plaintiffs agreed to operate the Airport's Employee Cafeteria. In negotiating the terms of the Management Agreement, ARA/WWC provided detailed historical financial information on the Cafeteria to Waridi, who was represented by counsel during the negotiations.

The Management Agreement was signed by both parties on March 31, 1988. It expressly acknowledged that the Employee Cafeteria was expected to operate at a projected annual deficit of $190,000 because the prices of goods were limited as an accommodation to Airport employees. This was immaterial to Plaintiffs, whose income was determined by payment of a management fee of 5% of gross receipts and the payment of additional compensation if Plaintiffs succeeded in keeping the actual deficit below $190,000.

Plaintiffs operated the Employee Cafeteria for more than a year under the Management Agreement. In June of 1989, Plaintiffs began negotiating to sublease the space so that A to Z

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[1]This was a facility within the Airport which, after undergoing extensive renovations in 1988, was destroyed by fire just when it was about to reopen in the Fall of 1988. The restaurant never reopened after the fire.

could become the sole operator of the Cafeteria. Under this proposal, Plaintiffs would no longer receive a management fee, but would instead receive all profits or, as it turned out, incur all losses from the Cafeteria.

On June 6, 1990, ARA/WWC and Plaintiffs executed a letter agreement summarizing the terms under which Plaintiffs would sublease the Employee Cafeteria. A subsequent letter agreement dated January 4, 1991, amended the Sublease. Taken together, the two letter agreements provided that ARA/WWC would subsidize Plaintiffs by: (1) defraying Plaintiffs' utility costs, (2) providing at no cost all of the Cafeteria's fixtures and equipment, and (3) paying a portion of the food costs for ARA/WWC employees utilizing the Cafeteria. The term of the Sublease was from June 6, 1990 to January 6, 1997. Further, the City approved Waridi's request to raise prices.

Plaintiffs unilaterally terminated the agreement by letter dated November 12, 1991. At the time Plaintiffs abandoned the Employee Cafeteria, Plaintiffs owed ARA/WWC in excess of $120,000 for inventory purchases.

During 1992, the parties negotiated as to whether Plaintiffs could return to the Airport and operate a concession unit in a terminal. On December 21, 1992, it was agreed that Plaintiffs (now as ADE) would assume the operation of a snack bar in Terminal C ("C Snack") selling food and non-alcoholic beverages.

Although Plaintiffs began operating C Snack on January

28, 1993, ARA/WWC and Plaintiffs never executed a written agreement defining the scope or duration of Plaintiffs' operations. There was continued disagreement over such issues as whether Plaintiffs could sell alcohol, and whether Plaintiffs' employees would be subject to the terms of the collective bargaining agreement which covered ARA/WWC's employees. The disputes were resolved by January 1994, when the parties agreed that Plaintiffs could seek approval from the state for a liquor license and Plaintiffs did not have to employ a labor union.

In 1994, as part of a plan to undertake major renovations and alter concession operations at the Airport, the City entered into an agreement with ARA/WWC to end its right to exclusivity under the Basic Lease and its amendments. The intention was that ARA/WWC would ultimately be replaced with a new prime contractor at the Airport.

Through an agreement that became effective February 1, 1994, ARA/WWC agreed to permit the City to terminate the Basic Lease. In exchange, ARA/WWC agreed to manage and operate the food and beverage concessions on a non-exclusive basis subject to the right of the City to obtain possession, on 30 days notice, of any or all locations. Plaintiffs sought, but did not obtain, a direct contract with the City.

ARA/WWC proposed a price increase on sandwiches it sold to concessionaires. After protests by Plaintiffs, the City agreed to absorb the price increase for sandwiches sold to Plaintiffs. Plaintiffs' product delivery time was changed from

8:30 a.m. to 1:00 p.m.

Because of the ongoing construction at the Airport, the City informed ARA/WWC that Plaintiffs would have to be moved out of the C Snack location by the end of September. ARA/WWC's concession locations were also changed as a result of the construction. ADE was given temporary carts in Terminal C to maintain operations.

In January 1995, the City selected Defendant Marketplace-Redwood Corporation ("Marketplace") as the new manager of Airport concessions. Plaintiffs continued to operate C Snack without a written contract, while the City began closing ARA/WWC's other concession locations for renovations and conversion to Marketplace. During this time, Marketplace placed carts near Plaintiffs' locations which allegedly adversely affected Plaintiffs' business.

By letter dated October 31, 1995, the city required ARA/WWC to surrender Plaintiffs' Terminal C location. On November 9, 1995, ARA/WWC notified Plaintiffs' counsel of the city's demand. Plaintiffs surrendered the concession unit and filed this lawsuit on the same day, November 30, 1995.

Plaintiffs' initial complaint alleged violations of Title VI of the Civil Rights Act and its implementing regulations, violations of Section 1983, common law claims for breach of contract and tortious interference with contract, and intentional and/or negligent infliction of emotional distress. By Memorandum Opinion and Order dated October 11, 1996, this

Court dismissed the counts for violations of Title VI and its implementing regulations and emotional distress. Plaintiffs filed a Second Amended Complaint, alleging (1)Section 1983 violations, (2) breach of contract, and (3) tortious interference with contract and prospective contract. ARA/WWC has also filed a counterclaim for breach of contract arising out of Plaintiffs' alleged failure to pay for rent and supplies furnished from March 1995 to November 1995.

Standard

Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party cannot rest on the pleading, but must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

Discussion

Section 1983

In order to establish Section 1983 liability, a plaintiff must establish that (1) the conduct complained of was committed by a person acting under color of state law, and (2) this conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327 (1986). Plaintiffs in the instant case are unable to establish either of these elements.

A. State Action

The requirement that the conduct was "under color of state law" has consistently been treated the same as the "state action" requirement under the Fourteenth Amendment. Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (1995), cert. denied, ___ U.S. ___, 116 S.Ct. 165 (1995). In order for the conduct of a private party to be state action, it must be fairly attributable to the state. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). The determination of whether conduct constitutes state action is necessarily fact-bound. Id. at 939. The Supreme Court has applied a variety of analyses in addressing this issue, but has not resolved whether there are several specific tests to determine state action, or merely different ways of characterizing the same inquiry. Id. The Third Circuit, while acknowledging that the inquiry may vary with the facts of each case, has specifically named three tests: the exclusive government function approach, the joint participation or

symbiotic relationship approach, and the nexus approach. Groman v. Township of Manalapan, 47 F.3d 628, 639 (3d Cir. 1995). Regardless of which analysis is applied to the facts in the instant case, Plaintiffs have failed to show that the conduct at issue was state action.

Conduct of a private party can be state action if the party performs a function that has been "traditionally the exclusive prerogative of the State." Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)) (emphasis in original). In Rendell-Baker, five employees brought a Section 1983 action against a private school specializing in students with difficulty completing public high school. Although public funds accounted for over 90% of the school's operating budget, the Supreme Court held that the school was not a state actor. The Court held that the mere fact that the state legislature provided funding for these services did not make them the exclusive province of the state. Rendell-Baker, 457 U.S. at 842. "That a private entity performs a function which serves the public does not make its acts state action." Id.

In Groman, the Third Circuit relied on Rendell-Baker in holding that a volunteer first aid squad was not performing an exclusive government function, and therefore could not be a state actor under this analysis. Groman, 47 F.3d at 641. Similarly, the Third Circuit applied the government function test in McKeesport Hosp. v. Accreditation Council for Graduate Med.

Educ., 24 F.3d 519 (3d Cir. 1994). In McKeesport, a hospital filed a Section 1983 action against a private accrediting body for graduate medical training programs. The court held that despite the fact that the defendant was recognized as the accrediting body by state regulation, it was not a state actor because the "accreditation of medical education in this country is neither a traditional nor an exclusive state function." Id. at 525.

In the instant case, Plaintiffs argue that the Airport is analogous to a public park, and that ARA/WWC controlled access to this public area.[2] But it is Defendants' conduct that is at issue. There is no evidence that access to the Airport terminals was controlled by ARA/WWC or Marketplace. Rather, they provided food and managed concessions. These are obviously not exclusive functions of the state. Therefore, the conduct of Defendants ARA/WWC and Marketplace did not constitute state action under the exclusive government function approach.

The Supreme Court has also held that private conduct may rise to the level of state action where the state so far insinuates itself into a position of interdependence with the

[2]In so arguing, the Plaintiffs rely upon Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, 745 F. Supp. 65 (D. Mass. 1990), which involved the arrest of protestors at a public outdoor shopping area by private security officers. Plaintiffs' reliance is misplaced. The distinction lies in the challenged conduct. In Faneuil Hall, the conduct at issue was the arrest of protestors in a public area, which is arguably an exclusive function of the government. In the instant case, the conduct is the provision of food and management of concession stands, which is clearly not the exclusive prerogative of the state.

private entity that it must be recognized as a joint participant in the challenged activity. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). "While the exact contours of this state action inquiry are difficult to delineate, the interdependence between the state and private actor must be pronounced before the law will transform the private actor into a state actor." Groman, 47 F.3d at 641. Courts have been reluctant to recognize a symbiotic relationship absent a high level of state involvement. Denchy v. Educ. & Training Consultants, 803 F. Supp. 1055, 1058 (E.D. Pa. 1992).

Significant public funding and regulation are not sufficient to create a symbiotic relationship. Blum v. Yaretsky, 457 U.S. 991, 1011 (1982). Blum involved the transfer of patients from private nursing homes that received state subsidization of their operating costs. Further, the state paid the medical expenses of over 90% of the patients in the facilities, and the state licensed the facilities. The Court held that privately owned enterprises providing services that the state would not necessarily provide, even when extensively regulated and substantially funded, do not become state actors under the Burton analysis. Id. Similarly, in Rendell-Baker, the Court applied this approach in addition to the government function test. Despite the relationship between the school and the state as described above, the Court concluded that the school was not a state actor under this analysis. Rendell-Baker, 457 U.S. at 840-43.

In McKeesport, the Third Circuit also utilized this approach in finding that a private accrediting body was not a state actor. The court found no symbiotic relationship because the entity was self-governed and financed, and set its own standards, while the state merely recognized and relied upon its expertise. McKeesport, 14 F.3d at 525. In a case even more analogous to this one, the Third Circuit applied the symbiotic relationship test to concessionaires at an airport. See Gannett Satellite Info. Network, Inc. v. Berger, 894 F.2d 61 (3d Cir. 1990). In Gannett, a newspaper publisher challenged a decision not to allow its vending machines in Newark Airport. Part of the regulatory scheme challenged included lease agreements with concessionaires. The publisher argued that the agreements permitted the concessionaires to act as "First Amendment gatekeepers" and that their refusal to sell Gannett's newspaper violated the Constitution. The Third Circuit rejected this reasoning, finding no symbiotic relationship between the government and the concessionaires, and therefore, the concessionaires' conduct did not constitute state action. Id. at 67.

In this case, the connections between ARA/WWC and the City include the following: ARA/WWC and the City were parties to the Basic Lease, ARA/WWC was required under the lease to pay rent and make certain capital improvements to the concession locations, ARA/WWC was required to devise and submit a plan calling for increased minority-owned and female-owned business

participation at the Airport, and the City's Minority Business Enterprise Council ("MBEC") was responsible for certifying minority and female businesses and monitoring the City's goals. The connections between Marketplace and the City include the following: Marketplace and the City were parties to a Master Lease Agreement ("MLA"), the City's involvement in subleasing is limited to the approval of individual subleases after negotiations are completed, the MLA requires Marketplace to operate in accordance with a Disadvantaged Business Enterprise Plan which mandates minority participation goals in awarding sublease contracts. These contacts, taken as a whole, do not rise to the level required for state action under the symbiotic relationship/joint participation analysis. The relationships between the City and these two private entities are no different than those of other independent contractors hired by the City. In Burton, patrons used a government-owned parking facility in order to gain access to a restaurant which leased the space from the government, thus creating a symbiotic relationship. In contrast, patrons do not use the City-owned Airport in order to gain access to the concessions. Rather, the concessions are incidental to the purpose of the Airport.

The Supreme Court has also held that private conduct can be state action where "there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." Jackson, 419 U.S. at 351. Mere

approval of or acquiescence in the private party's conduct is not sufficient to constitute state action. Blum, 457 U.S. at 1004-05. Rather, the state must exercise coercive power or provide significant encouragement such that the action must in law be deemed to be that of the state. Id. at 1004. This approach focuses on specific conduct, rather than the entire relationship between the government and the private entity. Imperiale v. Hahnemann, 776 F. Supp. 189, 199 (E.D. Pa. 1991) aff'd, 966 F.2d 125 (3d Cir. 1992).

Plaintiffs make numerous allegations of discriminatory acts by ARA/WWC and Marketplace, including: ARA/WWC offering Plaintiffs the Employee Cafeteria when it was known to be a "proven loss leader," ARA/WWC's provision of substandard products and services, ARA/WWC's refusal to indemnify Plaintiffs, ARA/WWC's refusal to increase Plaintiff's subsidy, and Marketplace's placement of vending carts in close proximity to Plaintiffs' operations. See Plaintiffs' Second Am. Compl. at 5-16. While Plaintiffs' do argue that the City participated in some of these actions (See Plaintiffs' Opp'n to Motions for Summ. J. at 70-71), there is no basis for concluding that the government exercised coercive power or in any way encouraged ARA/WWC or Marketplace in the conduct at issue. To the contrary, in many of Plaintiffs' allegations, the evidence indicates that the City made every effort to assist the Plaintiffs in disagreements and negotiations with ARA/WWC and Marketplace. See, e.g., ARA/WWC Exhibit 25 at ¶ 36. Therefore, Plaintiffs

have failed to establish state action under the nexus test.

B. Deprivation of Rights

In addition to proving state action, a Section 1983 plaintiff must prove the he or she was deprived of a right, privilege, or immunity secured by the Constitution or laws of the United States. Parratt, 451 U.S. at 535. Plaintiffs are unable to establish that ARA/WWC and Marketplace were state actors, but it cannot be disputed that the City was a state actor. Therefore, it is still necessary to examine whether or not Defendants deprived Plaintiffs of any rights secured by the Constitution. I find that they did not, and thus, even if Plaintiffs could establish that ARA/WWC and Marketplace were state actors, Plaintiffs' Section 1983 claim must fail against all Defendants.

Because Plaintiffs allege that the Defendants engaged in discrimination based upon Waridi's race, color, and gender, the constitutional predicate for Plaintiffs' Section 1983 action is the Equal Protection Clause of the Fourteenth Amendment.[3] To bring a successful Section 1983 claim for a denial of equal protection, Plaintiffs must prove the existence of purposeful discrimination. Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990). Plaintiffs must demonstrate that they were treated differently than other individuals who were similarly

[3]Plaintiffs argue that their claim is also based upon a violation of the Fourteenth Amendment Due Process Clause (see Plaintiffs' Opp'n to Motions for Summ. J. at 68-69), but there is nothing in the pleadings or in Plaintiffs' supporting documents to indicate any evidence of Due Process violations.

situated. Id. Specifically, the Plaintiffs must establish that any disparate treatment was based on Waridi's race, color, or gender. Long v. Board of Educ., 812 F. Supp. 525, 532 (E.D. Pa. 1993).

Plaintiffs' allegations of violations include: (1) offering Plaintiffs the Employee Cafeteria, a "proven loss leader," pursuant to the Management Agreement, (2) providing Plaintiffs with substandard products and services, (3) deceiving Plaintiffs regarding the profit potential of the Employee Cafeteria, (4) refusing to defend and indemnify Plaintiffs under ARA/WWC's insurance policy when a patron of the Employee Cafeteria filed a personal injury suit against Plaintiffs, (5) engaging in delay tactics for almost 14 months before permitting Plaintiffs to return to the Airport in 1993 as a concessionaire, (6) attempting to require Plaintiffs to employ union labor in C Snack in violation of federal labor law, (7) changing Plaintiffs' delivery time from 8:30 a.m. to 1:00 p.m., (8) increasing sandwich prices, (9) subjecting Plaintiffs to unfair competition by placing other vendors in close proximity to Plaintiffs' concessions, and (10) moving C Snack and Plaintiffs' eventual eviction. Plaintiffs do make other more general allegations, but those enumerated here are the most specific. All are equally without merit.

At the outset, it is important to note that most of the alleged discriminatory acts occurred more than two years prior to the filing of this suit, and they cannot form the basis for

Section 1983 liability. The Supreme Court has held that in Section 1983 actions, federal courts must apply the state statute of limitations governing general personal injury actions. Wilson v. Garcia, 471 U.S. 261 (1985); Owens v. Okure, 488 U.S. 235 (1989). In Knoll v. Springfield Township, 763 F.2d 584, 585 (3d Cir. 1985), the Third Circuit held that Section 1983 actions brought in Pennsylvania are subject to Pennsylvania's two-year statute of limitations for personal injury actions. See 42 Pa. C.S. § 5524. The statute of limitations begins to run when the cause of action accrues, and accrual of Section 1983 claims is governed by federal law. Long, 812 F. Supp. at 530. A civil rights action accrues when the plaintiff "knew or had reason to know of the injury that constitutes the basis of [the] action." Id. (quoting Sandutch v. Muroski, 684 F.2d 252, 254 (3d Cir. 1982). Plaintiffs unilaterally terminated the agreement to operate the Employee Cafeteria by letter dated November 12, 1991. The letter indicated a desire to "make [Plaintiffs] whole after the extraordinary losses . . . sustained in operating the Employee Cafeteria." ARA/WWC Exhibit 10. Thus, Plaintiffs had actual knowledge of the alleged Section 1983 violations on November 12, 1991. Plaintiffs instituted this action on November 30, 1995. The statute of limitations bars any claims accruing prior to November 30, 1993. Therefore, any claims relating to the Employee Cafeteria are barred by the statute of limitations.

Plaintiffs also allege violations during the negotiations for Plaintiffs to return to the Airport after

ceasing operations at the Employee Cafeteria. The parties reached an agreement on December 21, 1992 whereby Plaintiffs could begin operating C Snack. Thus, any claims relating to this process are also barred.

Even if many of Plaintiffs Section 1983 claims were not barred by the statute of limitations, all of the claims are meritless because Plaintiffs cannot establish purposeful discrimination. In Long, a teacher sued the Philadelphia Board of Education, alleging that she had been discriminated against on the basis of race and gender. But despite her enumeration of several actions taken by the principal, the court found that the plaintiff was unable to produce any credible evidence that any of the facially neutral acts was taken on the basis of her race or gender. Long, 812 F. Supp. at 532-33. In the instant case, despite extensive discovery conducted by all parties, Plaintiffs have been unable to offer any facts remotely indicating discriminatory purpose in the actions of any of the Defendants.

Plaintiffs' allegation that they were offered a "proven loss leader" in the Employee Cafeteria ignores the crucial fact that under the Management Agreement Plaintiffs bore almost none of the risk for losses of the operation. Plaintiffs' compensation under the agreement was computed as 5% of net receipts, without regard to the ultimate profitability of the Cafeteria. See ARA/WWC Ex. 3 at ¶ 12. Further, the agreement provided that ARA/WWC was responsible for the first $190,000 in losses and 90% of any loss in excess of $190,000. See Id. This

evidence further contradicts Plaintiffs' contention that the Defendants deceived them regarding the profit potential of the Employee Cafeteria.

Plaintiffs also allege that they were provided with substandard products and services. At her deposition, Waridi admitted that at all times she had the right to reject any inventory items that she found to be unsatisfactory. See ARA/WWC Ex. 2 at 102-03. The allegations relating to services provided are assumed to refer to the withdrawal of ARA/WWC's management-level employees from the Cafeteria. The removal of management-level personnel was done pursuant to the parties' contractual arrangement.

Plaintiffs also allege that discrimination is demonstrated by ARA/WWC's refusal to indemnify Plaintiffs. However, Plaintiffs ignore the Management Agreement, which expressly provides that A to Z was required to carry comprehensive general liability insurance, and that it would be a direct cost of operation. ARA/WWC Ex. 3 at ¶ 11. Further, Waridi admitted in deposition testimony that she believed ARA/WWC had paid her attorneys' bills in connection with the lawsuit as well as her portion of the settlement. ARA/WWC Ex. 2 at 95-97.

Similarly, the alleged delay of 14 months during which Plaintiffs negotiated returning to the Airport does not demonstrate discriminatory intent. Plaintiffs had abandoned the Employee Cafeteria, leaving over $120,000 in unpaid bills. See ARA/WWC Ex. 2 at 244-46. Any apprehension on the part of

Defendants was understandable, and in no way indicates discriminatory intent.

Plaintiffs further allege that Defendants' attempt to require Plaintiffs to employ union labor demonstrates discriminatory animus. However, there is no evidence of discriminatory purpose. ARA/WWC's evidence indicates that Defendants were not aware of its illegality. See ARA/WWC Ex. 14 at 154-55, 165.

The change in Plaintiffs' delivery time likewise does not indicate any unlawful motive. Waridi admitted at her deposition that, after complaining, her delivery time was changed. See ARA/WWC Ex. 2 at 779-81. There is nothing to support the allegation that Waridi's race or gender was a factor in her delivery time.

Plaintiffs also allege that a proposed sandwich price increase was motivated by Waridi's race or gender. ARA/WWC, in turn, contends that the price increase was due to increased costs. See ARA/WWC Ex. 14 at 195-96; ARA/WWC Ex. 30. However, the City agreed to absorb the price increase for Plaintiffs, thereby allowing the prices to remain the same to Plaintiffs. See ARA/WWC Ex. 24. Thus, not only was any price increase irrelevant to Plaintiffs, it is also difficult for Plaintiffs to substantiate allegations of discrimination against the City after agreeing to this accommodation.

Plaintiffs also contend that the placement of other vending operations ("kiosks") in close proximity to Plaintiffs

and allowing them to sell some of the same goods sold by Plaintiffs was discriminatory. The placement of these kiosks was pursuant to Marketplace's plan to maximize the number of concession operators at the Airport. Food kiosks had been placed in another concourse previously. Any competition actually advanced one of the provisions of Marketplace's Master Lease Agreement with the City. The lease required Marketplace to foster competition among vendors and mandated that prices at the Airport be the same as in the general Philadelphia area. See Marketplace Ex. D at §§ 8.02, 8.04. A manager at C Snack described Plaintiffs' prices as "exorbitant" prior to the arrival of the kiosks, and stated that the competing vendors forced Plaintiffs to lower prices. See Marketplace Ex. CC at 116. Further, the kiosks about which Plaintiffs complained were both owned by women, one of whom was African American. See Marketplace Ex. K at ¶ 4. Currently, 70% of kiosks at the Airport are owned by African-Americans, and 31% are owned by African American women. See id. at ¶ 3. Thus, Plaintiffs are unable to offer any evidence that there was a discriminatory motive underlying this action.

Therefore, Plaintiffs are unable to establish the elements of a Section 1983 action. Defendants ARA/WWC and Marketplace did not engage in state action. Further, neither the private Defendants nor the City deprived the Plaintiffs of any rights secured under the Constitution or laws of the United States.

Breach of Contract

Plaintiffs allege breach of contract claims against all Defendants. The contracts upon which the claims are based are: (1) Amendment No. 7 to the Basic Lease, (2) the Minority Utilization Plan submitted by ARA/WWC to the City pursuant to Amendment No. 7, (3) the March 31, 1988 Management Agreement, (4) the Sublease embodied in the June 6, 1990 and January 4, 1991 letter agreements between the parties, and (5) the oral contract pursuant to which Plaintiffs operated C Snack. Plaintiffs argue that there are other contracts involved in the claims (see Plaintiffs' Opp'n to Summ. J. at 75-77) but most of the allegations concern issues relating to the contracts listed above.

The only specific breaches alleged by Plaintiffs against Marketplace are regarding Marketplace's "Agreement to abide by the law" and "Marketplace's Agreement to negotiate in good faith with ADE." Id. at 77. Despite the possible philosophical interest that would be generated by a discussion regarding the social contract and one's "agreement to abide by the law," this Court must restrain itself. There is no evidence indicating the existence of any such agreements.

Aside from these assertions, Plaintiffs do not argue any breach of contract by Marketplace. Further, by Waridi's own admission, no contract ever existed between Plaintiffs and Marketplace. See Marketplace Ex. N at 592-93. Plaintiffs are also unable to pursue a third-party beneficiary claim against

Marketplace. The Master Lease Agreement between Marketplace and the City specifically states that no third party beneficiaries are intended. See Marketplace Ex. D at § 15.08.[4] Thus, Plaintiffs breach of contract claims against Marketplace are without merit.

Pennsylvania law provides a four-year statute of limitations for contract claims. 42 Pa. C.S. § 5525. As stated above, Plaintiffs filed this action on November 30, 1995. Any claims accruing before November 30, 1991 are barred by the statute of limitations. Under Pennsylvania law, an action for breach of contract accrues at the time of the breach. Baird v. Marley Co., 537 F. Supp. 156, 157 (E.D. Pa. 1982). Waridi wrote a series of letters, the last of which is dated October 29, 1990, complaining that ARA/WWC was not in compliance with the Management Agreement, the Sublease, Amendment No. 7, and the Minority Utilization Plan. See ARA/WWC Exs. 34-36. Thus, Plaintiffs had actual knowledge of any breaches under these alleged contracts more than four years before the filing of this action. Therefore, any breach claims relating to Amendment No. 7, the Minority Utilization Plan, the Management Agreement, and the Sublease are barred by the Statute of Limitations.

Even if these claims were not barred by the statute of

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[4]The Agreement specifically provides:

> Section 15.08 No Third Party Beneficiaries. Nothing in this Agreement expressed or implied, is intended or shall be construed to confer upon or give to any person, firm, corporation, or legal entity, other than the parties, any rights, remedies, or other benefits under or by reason of this Agreement.

limitations, Plaintiffs still would not prevail. Plaintiffs claim to be third-party beneficiaries to Amendment No. 7. Under Pennsylvania law, a party becomes a third-party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself. Scarpitti v. Weborg, 609 A.2d 147, 151 (Pa. 1992). There is an exception where the circumstances are so compelling that recognizing the "beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Id. In the case of governmental contracts, the test for whether a member of the public is a third-party beneficiary is strictly applied. Drummond v. Univ. of Pa., 651 A.2d 572, 578 (Pa. Commw. 1994), appeal denied, 661 A.2d 875 (Pa. 1995). In general, a promisor who contracts with the government is not subject to contractual liability to members of the public because "individual members of the public are merely incidental beneficiaries unless a different intention is manifested within the contract." Id. (citing Nguyen v. United States Catholic Conference, 548 F. Supp. 1333 (W.D. Pa. 1982), aff'd 719 F.2d 52 (3d Cir. 1983)). There must be some language in the contract evincing an intent that the party contracting with the government will be held liable to third parties in the event of a breach. Nguyen, 548 F. Supp. at 1348.

In Drummond, the court applied this test to a group of

Philadelphia school children who sued the University of Pennsylvania alleging that the University failed to comply with a number of agreements between the University and the City. The children conceded that their standing to bring a contract action rested on their claim that they were third-party beneficiaries of the agreements between the City and the University. The court found that nothing in the contract indicated an intention by the City and the University that there would be liability to third-party beneficiaries. Drummond, 651 A.2d at 579.

In the case at bar, Plaintiffs can point to nothing in either Amendment No. 7 or in the Minority Utilization Plan indicating an intent by the parties to be held liable by third-party beneficiaries. Accordingly, Plaintiffs cannot recover under this theory.[5]

Plaintiffs' allegations of breach of the Management Agreement are virtually identical to those for the Section 1983 claim. These include claims that ARA/WWC refused to indemnify plaintiffs as well as the alleged provision of substandard food. As was discussed above, Plaintiffs suffered no damages from these alleged breaches. Other alleged breaches (e.g. promise to give Plaintiffs adequate exposure to traffic) are based on alleged promises not mentioned in the Management Agreement.

The only remaining contract claim (the only one not

[5]It is worth noting that this Court finds no evidence to indicate that the Minority Utilization plan is a contract. There is no offer and acceptance surrounding it. Rather, it appears to be merely a statement of ARA/WWC's goals that was prepared pursuant to an agreement with the City.

barred by the statute of limitations) relates to the oral agreement between Plaintiffs and ARA/WWC whereby Plaintiffs operated C Snack. Plaintiffs claim ARA/WWC breached this agreement by: (1) not permitting Plaintiffs to sell alcoholic beverages, (2) increasing sandwich prices, (3) changing the product delivery schedule, and (4) moving Plaintiffs to a different location and the subsequent eviction. ARA/WWC has asserted a counterclaim based on this contract, alleging that Plaintiffs failed to pay amounts due for rent and products supplied. While there is no dispute as to the existence of this contract, neither party offers evidence establishing all of the material terms of this agreement. Thus, there are issues of fact regarding both Plaintiffs' claim and ARA/WWC's counterclaim based upon this contract, and summary judgment is not appropriate.

Tortious Interference

Under Pennsylvania law, four elements are required to state a claim for tortious interference with contract: (1) the existence of a contract, (2) that Defendants had the purpose or intent to harm Plaintiffs by interfering with the contract, (3) the absence of justification or privilege for the interference, and (4) damages. Killian v. McCulloch, 850 F. Supp. 1239, 1251 (E.D. Pa. 1994). The two-year statute of limitations as set forth in 42 Pa. C.S. § 5524(3) applies to actions for tortious interference with contract. Torchia v. Keystone Foods Corp., 635 A.2d 1082, 1086 (Pa. Super. 1993). Thus, any claims accruing before November 30, 1993 are barred.

In their Argument, Plaintiffs allege the following tortious interferences: (1) ARA/WWC tortiously disrupted the third-party beneficiary contract between the City and Plaintiffs arising out of Amendment No. 7, (2) the City tortiously disrupted Plaintiffs' contracts with ARA/WWC for operation of the Employee Cafeteria and C Snack, (3) all Defendants tortiously disrupted ADE's employees' abilities to provide quality service pursuant to their employment contracts, (4) the City and ARA/WWC tortiously interfered in Marketplace's alleged agreement to negotiate in good faith with Plaintiffs, and (5) Marketplace tortiously disrupted the contract between ARA/WWC and the City to which Plaintiffs were third-party beneficiaries. None of these allegations meets the elements required for a tortious interference claim.

As discussed above, Plaintiffs were not third-party beneficiaries to the contract between the City and ARA/WWC. Thus, the first and fifth claims cannot meet the requirement that a contract exists. Similarly, Plaintiffs failed to establish any agreement on the part of Marketplace to negotiate in good faith, leaving no basis for the fourth allegation. Further, Plaintiffs offer no evidence of contracts between ADE and its employees, and therefore, the third allegation cannot be the basis for a claim. Plaintiffs can only establish the existence of a contract regarding their second allegation. But, although the first element of tortious interference is met, the second is not. Plaintiffs are unable to offer any indications that the City had

the intent or purpose to harm the Plaintiffs. Therefore, Plaintiffs have no claim for tortious interference with contract.

Plaintiffs also allege tortious interference with prospective contracts. Under Pennsylvania law, the elements of this claim are: (1) a prospective contractual relation, (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring, (3) the absence of privilege or justification, and (4) actual harm or damage. Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979). A prospective contractual relation is "something less than an contractual right, something more than a mere hope." Id. Plaintiffs must establish a "reasonable likelihood or probability" that a contractual relation would have occurred. Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 898 (3d Cir. 1981).

Plaintiffs allege in their Argument that Defendants interfered as follows: (1) the City caused ARA/WWC to back out of a written contract with Plaintiffs regarding operation of C Snack, (2) the City and ARA/WWC caused the Airport employees' unions to refuse ADE an independent contract, (3) the City and ARA/WWC caused liquor suppliers to stay out of anticipated agreements with ADE, (4) the City and ARA caused prospective customers to avoid purchases from Plaintiffs by presenting Plaintiffs' business as substandard, (5) ARA/WWC and Marketplace caused the City to balk at entering into a contract with Plaintiffs, (6) the City and ARA/WWC caused Marketplace to balk at entering into a contract with Plaintiffs, and (7) the City and

Marketplace caused prospective customers to avoid purchases from Plaintiffs by placing competitors in close proximity to Plaintiffs' concession stand.

Plaintiffs' first allegation is insufficient to form the basis for this claim because it is merely related to the form of the contract regarding C Snack. Plaintiffs cannot show the existence of a prospective contractual relation because there was an actual contract between the parties. The remaining allegations are merely bare assertions, with no supporting facts. Plaintiffs offer no evidence to show a "reasonable likelihood or probability" that any of these possible contractual relations would have occurred in the absence of Defendants' conduct. Further, Plaintiffs have been unable to offer any evidence regarding the second element of the tort: purpose or intent to harm the Plaintiffs. Therefore, Defendants are entitled to summary judgment on the claim for tortious interference with prospective contracts.

Conclusion

In summary, there is no genuine issue of material fact as to Plaintiffs' Section 1983 claim. Defendants ARA/WWC and Marketplace were not state actors. Even if they had engaged in state action, Plaintiffs were not deprived of any rights secured by the Constitution or laws of the United States. Thus, summary judgment must be granted as to Count I of the Second Amended Complaint in favor of all Defendants.

Regarding Count II of the Second Amended Complaint,

Plaintiffs failed to establish that there is any issue of fact as to claims against the City and Marketplace, and thus, those breach of contract claims will be dismissed. Further, there is no issue of fact regarding the contract claims against ARA/WWC, with the exception of those arising out of the oral agreement by which Plaintiffs operated C Snack. Thus, summary judgment will be entered in favor of ARA/WWC as to all claims based upon written contracts, but summary judgment will not be granted for claims based upon the oral agreement because there is a genuine issue of material fact. Similarly, ARA/WWC's Motion for Summary Judgment on their counterclaim is denied.

Plaintiffs are unable to show that there is any issue of fact regarding their claims for tortious interference with contract and tortious interference with prospective contract. Therefore, Count III of the Second Amended Complaint will be dismissed as to all Defendants.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A.D.E. FOOD SERVICES CORP. and ZENOBIA WARIDI, Plaintiffs, v. CITY OF PHILADELPHIA, MARY ROSE LONEY, ARA SERVICES, INC., ARAMARK LEISURE SERVICES, INC., WORLDWIDE CONCESSIONS, INC., and MARKETPLACE/REDWOOD CORP., Defendants.	:	CIVIL ACTION NO. 95-7485

ORDER

AND NOW, this 9th day of October, 1997, upon consideration of Defendants' Motions for Summary Judgment and all responses thereto, it is hereby ORDERED that:

1. The Motion of Defendants City of Philadelphia and Mary Rose Loney is GRANTED;

2. Defendant Marketplace Redwood Corporation's Motion is GRANTED;

3. The Motion of Defendants ARA Services, Inc., ARAMARK Leisure Services, Inc., and Worldwide Concessions, Inc., for Summary Judgment is GRANTED in part and DENIED in part. With regard to Counts I and III, said Motion is GRANTED. With regard to Count II, said Motion is DENIED as to all claims arising out of the oral contract by which Plaintiffs operated the concession operation in Terminal C, and said motion is GRANTED as to all other claims in Count II;

4. The Motion of Defendants ARA Services, Inc., ARAMARK Leisure Services, Inc., and Worldwide Concessions, Inc., for Summary Judgment on Their Counterclaim is DENIED.

BY THE COURT:

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Robert F. Kelly, J.